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# Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law

Susan J. Becker

*Cleveland State University*, [s.becker@csuohio.edu](mailto:s.becker@csuohio.edu)

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# SECOND-PARENT ADOPTION BY SAME-SEX COUPLES IN OHIO: UNSETTLED AND UNSETTLING LAW

SUSAN J. BECKER<sup>1</sup>

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## I. INTRODUCTION

While debate rages throughout Ohio and elsewhere regarding adopting of children by same-sex parents, what cannot be debated is the need for adoptive homes.<sup>2</sup> Almost 500,000 children in the United States are in foster care awaiting

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<sup>1</sup>Susan Becker is an associate professor of law at Cleveland-Marshall College of Law, Cleveland State University. She served as legal counsel for the amicus curiae in the *In re Jane Doe* litigation. Professor Becker wishes to thank her friends and colleagues Barbara Tyler and Veronica Dougherty for their comments on various drafts of this article but retains full responsibility for any miscues in this piece.

<sup>2</sup>See generally ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999); see also Symposium, *Adopting More Kids: Barriers and Solutions*, 28 CAP. U. L. REV. 73-151 (1999).

permanent homes.<sup>3</sup> In Ohio's Cuyahoga County alone, 2,700 children are in foster care awaiting permanent placements.<sup>4</sup> In response to this crushing need, the federal government has enacted laws providing financial incentives to states that streamline their adoption procedures and place these children in permanent homes.<sup>5</sup>

In addition to the need for homes for children without any legally recognized parent, the need for a child who already has one legal parent to be adopted by the parent's gay or lesbian partner who is already serving as a de facto parent is very important to the child's emotional stability and material well being. This type of adoption, frequently referred to as a "second-parent" adoption,<sup>6</sup> is the focal point of this article. However, the matters discussed herein also apply directly and by analogy to situations where gay and lesbian couples and heterosexual unmarried couples desire to jointly adopt a child who is a ward of the state.

There are many ways in which lesbian and gay couples<sup>7</sup> seek to become parents and form legally recognized families through adoption. Typical scenarios include a gay or lesbian couple without biological children seeking to jointly adopt a child through a county child welfare department or a private adoption. One partner may have a biological child from a previous heterosexual relationship, and both the biological parent and their partner want the partner to adopt that child. One partner may have adopted a child in the United States or in a foreign country, and the other partner now wants to also adopt the child. A gay couple may have involved a surrogate mother to have a child, and the non-biological father wishes to adopt the child. A lesbian couple may decide to bring a child into this world together, with one becoming the biological mother either through a known or anonymous sperm donor, and the non-biological mother may seek to adopt that child. Any of these situations may, of course, involve more than one child.<sup>8</sup>

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<sup>3</sup>H.R. REP. NO. 105-89, at 7-8 (1997) (reprinted in 1997 U.S.C.C.A.N. 2740).

<sup>4</sup>Christopher Quinn, *Wanted: Parents; County Adoption Crisis*, PLAIN DEALER, Sept. 30, 1999, at A1.

<sup>5</sup>See, e.g., Adoption and Safe Family Act of 1997, Pub. L. No. 105-89 (providing financial incentives for states that increase the number of foster children for whom permanent families are established through adoption).

<sup>6</sup>Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019 (1999); Emily Duskow, *The Second Parent Trap: Parenting for Same-Sex Couples in a Brave New World*, 20 J. JUV. L. 1 (1999); Maxwell S. Peltz, *Second-Parent Adoption: Overcoming Barriers to Lesbian Family Rights*, 3 MICH. J. GENDER & LAW 175 (1995).

<sup>7</sup>The term "gay couple" as used herein means two males who identify themselves as homosexual and who are in a committed relationship; a "lesbian couple" means two women in this type of relationship. These definitions also allow for the possibility that one or both partners in a couple may identify as bisexual, but each has made a commitment to a relationship that would be traditionally defined as homosexual.

<sup>8</sup>Vast literature exists on the legal and social ramifications of homosexuals adopting and raising children. Although the author is familiar with these excellent sources of data and analysis, they are not extensively cited throughout this piece because the focus here is not on the appropriateness of such adoptions generally, but rather the specific situation presented by relevant Ohio law. See generally, authorities cited in footnote 6, *supra* and footnote 104,

Each scenario provides a variety of financial, social, medical and other challenges for the partners and their children. But perhaps the biggest challenge is obtaining legal recognition – and thus the numerous safeguards and benefits that accompany legally recognized relationships – for this relatively new family paradigm.<sup>9</sup>

At one end of the spectrum are states that prohibit homosexuals from adopting either individually,<sup>10</sup> or by denying petitions in what are generically categorized as “second-parent adoptions.”<sup>11</sup> But a greater number of states have recognized the validity of cementing the relationship between the child and her *de facto* parent by allowing the non-biological or non-legally recognized parent to adopt the child.<sup>12</sup>

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*infra*. See also, JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* (1996).

<sup>9</sup>Issues of family law, including adoption, have traditionally been within the sovereign powers of the states. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (subject of domestic relations belongs to the laws of the states except in rare occasions when family law comes into conflict with federal statute); *In re Burrus*, 136 U.S. 586 (1890). Therefore, attempts to invoke federal courts and law into family law matters is seldom successful unless a colorable federal constitutional issue is presented. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000). The *Troxel* Court, for example, struck down Washington statutes that allowed any person to petition the court for visitation rights at any time, and empowered courts to order visitation when it “may serve the best interest of the child.” WASH. REV. CODE § 26.10.160(3) (1994). Although the Court splintered in its reasoning for striking down the statute, at least four justices agreed that such legislation violated the parents’ constitutional right to custody, care and control of their children, a right which the Court characterized as “perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Troxel*, 530 U.S. at 65.

<sup>10</sup>As of this writing, Florida and Mississippi are the only states that have statutes explicitly prohibiting adoptions by homosexuals. See FLA. STAT. ANN. § 63.042(d)(3) (West 1999); MISS. CODE ANN. § 93-17-3(2) (2000). See also Cheryl Wetzstein, *Mississippi Bans Adoptions by Homosexuals; Law Spurred by Vermont Gay Benefits*, WASH. TIMES, May 5, 2000, at A1. Utah’s Board of Trustees of the Division of Child and Family Services approved two policies in March, 2000, which prohibit “cohabiting” adults – defined in a manner that includes gay and lesbian couples – from being foster parents and from adopting children. See Hilary Groutage, *State Board Adopts Policies on Adoption, Foster Care*, SALT LAKE TRIB., Apr. 1, 2000, at D4. The policies reflect changes in Utah law that became effective May 1, 2000 that prohibit unmarried persons from adopting children. UTAH CODE ANN. § 78-30-9(3)(a-b) (2000). A New Hampshire law prohibiting foster parenting and adoption by gays and lesbians was repealed effective July 2, 1999. Norma Love, *New Hampshire Repeals 12-Year Ban on Child Adoptions by Homosexuals*, PORTLAND PRESS HERALD, May 4, 1999, at 4B.

<sup>11</sup>See, e.g., *In re Adoption of Baby Z*, 724 A.2d 1035 (Conn. 1998); *Georgia G. v. Terry M.*, 516 N.W.2d 678, 684 (Wisc. 1994). The Connecticut court’s decision was trumped by state legislation allowing homosexuals and other unmarried persons to adopt their partner’s children. Conn. H.B. 5830 was signed by the governor June 1, 2000. It allows a person who shares parental responsibilities for the child with the child’s parent to adopt or join the adoption of a child even though the two adults are not married, provided that the probate court finds the proposed adoption in the best interest of the child.

<sup>12</sup>See, e.g., *M.M.D. & B.H.M.*, 662 A.2d 837, 859 (D.C. 1995); *In re Petition of K.M. and D.M. to Adopt Olivia M.*, 653 N.E.2d 888, 899 (Ill. 1995); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 541 (N.J. 1995); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993); *In re Jacob*, 600 N.E.2d 397, 405-06 (N.Y. 1995); *Adoptions of B.L.V.D. & E.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993). As revised in 1995, Vermont’s adoption statute recognized

Ohio law regarding second-parent adoptions remains unsettled. In *In re Adoption of Jane Doe*, the Summit County Court of Appeals, Ninth Appellate District, interpreted Ohio law as disallowing second-parent adoption.<sup>13</sup> But the Supreme Court of Ohio's refusal to review the case means that the decision is only binding in the Ninth District, with other districts being free to accept or reject the rationale of the Ninth District opinion.<sup>14</sup>

The petitioners in *In re Jane Doe* are a lesbian couple who decided to become parents. One woman is the biological mother, and her partner is a de facto and psychological parent to the child. Despite the non-biological mother's loving and dutiful acceptance and execution of her parental role from the day of the child's conception to the present, she remains a total stranger to the child in the eyes of the law. The decision in *In re Jane Doe* ensures that the stranger relationship will continue. As more fully explained below, the rationale employed by the Ninth District's decision to deny the adoption arguably extends to every case where a gay, lesbian, or even unmarried heterosexual partner of a parent seeks to adopt the partner's child.

Section II of this article provides an overview of Ohio adoption law. Section III presents the case of *In re Jane Doe*, starting with the decision of the lesbian couple to jointly bring a child into this world, and continuing with the efforts of both mothers to obtain legal recognition for the de facto parent's status through adoption, and the legal strategies employed by the mothers' attorneys, also addressed are the court-appointed Guardian Ad Litem (GAL), the social science data supplied by the amicus curiae to help the court reach a fully informed decision, and the Ohio courts' rejection of the possibility of second-parent adoptions in Ohio. Section IV offers a critique of the courts' analysis of the case. Section V is a brief conclusion.

## II. OHIO ADOPTION LAW

The legal principles governing adoption in Ohio are drafted and adopted by the Ohio General Assembly and signed into law by the governor. Ohio adoption law is primarily codified in Chapter 3701 of the Ohio Revised Code. Since no statutory scheme can cover the myriad issues arising in the adoption context, significant case law provides guidance for the interpretation and application of Chapter 3701.

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the right to second-parent adoptions. VT. STAT. ANN. tit. 15A § 1-102 (1999). At least one court in Indiana has allowed second parent adoptions. See Scott Olson, *N.J. Ruling on Adoption by Gays Not Likely to be Duplicated by Indiana, Experts Say*, IND. LAW., Jan. 7, 1998, at 11.

<sup>13</sup>*In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

<sup>14</sup>Article IV, § 3 of the Ohio constitution establishes the appellate court system. Article IV, § 3(B)(4) provides that when an appeals court announces a decision that conflicts with a decision rendered by any of the 11 other courts of appeal in the state, "the judges shall certify the record of the case to the supreme court for review and final determination." Therefore, it is the Supreme Court of Ohio, rather than appeals court, that establishes state-wide precedent. Ohio's courts of appeal are structured pursuant to OHIO REV. CODE ANN. § 2501 (West 2000). This statute creates twelve appellate districts, with three consisting of only one county each (Cuyahoga, Franklin, and Hamilton) and the largest consisting of 17 counties. OHIO REV. CODE ANN. § 2501.01 (West 2000).

In Ohio, only an agency licensed by the state or an attorney may arrange an adoption.<sup>15</sup> Persons who may be adopted include a minor, a permanently disabled or mentally retarded adult, or an adult who, as a minor, established a child-foster parent or child-stepchild relationship with the person seeking to adopt.<sup>16</sup> Persons who may adopt include "a husband and wife together, at least one of whom is an adult"<sup>17</sup> and "an unmarried adult."<sup>18</sup> A married adult can adopt without the other spouse joining the petition in several circumstances, including where "the other spouse is a parent of the person to be adopted and supports the adoption."<sup>19</sup>

The person seeking to adopt must file a petition for adoption<sup>20</sup> with the probate division of the court of common pleas.<sup>21</sup> A home study is usually conducted by an "assessor" – traditionally a professional counselor, social worker or psychologist<sup>22</sup> – "for the purpose of ascertaining whether a person seeking to adopt a minor is suitable to adopt."<sup>23</sup> One or more hearings are held to determine whether the legal prerequisites are met and whether the facts support a finding that the proposed adoption is in the best interest of the person to be adopted.<sup>24</sup>

The effects of a final adoption decree include creating "the relationship of parent and child between petitioner and the adopted person, as if the adopted person were a

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<sup>15</sup>OHIO REV. CODE ANN. § 3107.011 (West 2000).

<sup>16</sup>OHIO REV. CODE ANN. § 3107.02 (West 2000).

<sup>17</sup>OHIO REV. CODE ANN. § 3107.03(A) (West 2000).

<sup>18</sup>OHIO REV. CODE ANN. § 3107.03(B) (West 2000).

<sup>19</sup>OHIO REV. CODE ANN. § 3107.03(D)(1) (West 2000). Consent to adoptions must be obtained from a mother, father, or putative father whose rights will be terminated by the adoption, by any agency that has permanent custody of the child, and the minor being adopted if more than 12 years of age. OHIO REV. CODE ANN. §§ 3107.06, 3107.081 (West 2000).

<sup>20</sup>OHIO REV. CODE ANN. § 3107.031 (West 2000). Procedures in probate courts are governed by Ohio Rules of Civil Procedure "except to the extent that by their nature they would be clearly inapplicable," OHIO R. CIV. P. 73(A), and local rules of court promulgated under the authority delegated by the Supreme Court of Ohio in OHIO R. CIV. P. 83(B). Forms used in probate court are prescribed by Rule 51 of the Rules of Superintendence for the Courts of Ohio enacted by the Supreme Court of Ohio. See OHIO R. CIV. P. 73(H); SUP. R. 51. However, the rules allow "an original pleading" to be prepared for filing which modifies the information required in the applicable form as the particular case or proceeding requires. SUP. R. 51(C)(2).

<sup>21</sup>The petition for adoption can be filed in the county where the person to be adopted was born, or where, "at the time of filing the petition, the petitioner or the person to be adopted or parent of the person to be adopted resides." OHIO REV. CODE ANN. § 3107.04(A) (West 2000). The probate courts have original and exclusive jurisdiction over adoption proceedings. *State, ex rel. Portage Cty. Welfare Dept. v. Summers*, 311 N.E.2d 6 (Ohio 1974).

<sup>22</sup>OHIO REV. CODE ANN. § 3107.012 (West 2000).

<sup>23</sup>OHIO REV. CODE ANN. § 3107.031 (West 2000). The person conducting the home study, known as an "assessor" under Ohio law, must have specific credentials and training as set forth in OHIO REV. CODE ANN. § 3107.012 (West 2000).

<sup>24</sup>OHIO REV. CODE ANN. § 3107.14 (West 2000). See also OHIO REV. CODE ANN. § 3107.011 (West 2000).

legitimate blood descendant of the petitioner, for all purposes including inheritance and applicability of statutes, documents, and instruments. . . ."<sup>25</sup> The final decree also makes the adopted person "a stranger to the adopted person's former relatives for all purposes."<sup>26</sup> As discussed later in this article,<sup>27</sup> this statutory severance from former relatives formed the basis of the trial and appellate court decisions in *In Re Adoption of Jane Doe* to bar gay men and lesbians from adopting their partners' children unless the biological parent/partners' rights are terminated.

In general, Ohio courts have interpreted the adoption statutes liberally to ensure that the best interests of the child are met. In fact, Ohio's highest court has acknowledged that "strict construction does not require that we interpret [adoption] statutes in such a manner that would mandate an unjust or unreasonable result."<sup>28</sup> In one case, the Supreme Court of Ohio overrode the statutory mandate requiring agency approval of a proposed adoption, ruling that the probate court is empowered to disregard that statutory requirement when it is in the best interest of the child to do so.<sup>29</sup>

In terms of adoption by gay men or lesbians, perhaps the most important thing is what the statute and case law do not hold: there is no statutory nor is there a common law prohibition against homosexuals or unmarried individuals adopting in Ohio. The possibility that adoptions by homosexuals would be *per se* prohibited by courts based on public policy or upon a "best interest of the child" analysis was soundly rejected by the Supreme Court of Ohio in the case of *In re Charles B.*<sup>30</sup>

The petitioner in *Charles B* was a gay man who cohabitated with his male partner. Mr. B had been a foster parent of a young boy for several years. The probate court held that the adoption was in the child's best interest, but the appeals court reversed, finding that, as a matter of law, homosexuals are not allowed to adopt. "The court of appeals stated, in effect, that it could never be in a child's best interest to be adopted by a person such as Mr. B."<sup>31</sup>

The Supreme Court of Ohio reinstated the adoption, finding that the proposed adoption by Mr. B satisfied the threshold statutory requirements of the child being a minor and the petitioner being an unmarried adult.<sup>32</sup> Thus, the only remaining issue was whether the adoption would be beneficial to the child. The court explained: "The polestar by which courts in Ohio, and courts around the country, have been guided is the best interest of the child to be adopted. This standard is applied in

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<sup>25</sup>OHIO REV. CODE ANN. § 3107.15(A)(2) (West 2000).

<sup>26</sup>OHIO REV. CODE ANN. § 3107.15(A)(1) (West 2000). Similar provisions are found in other states. See Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1021, nn. 6 & 7 (1999).

<sup>27</sup>See discussion *infra* 18-19 & 30-33.

<sup>28</sup>*In re Adoption of Zschach*, 665 N.E.2d 1070, 1076 (Ohio 1996) (word in bracket added).

<sup>29</sup>*State ex rel. Portage County Welfare Dept. v. Summers*, 311 N.E.2d 6, 11-12 (Ohio 1974).

<sup>30</sup>552 N.E.2d 884 (Ohio 1990).

<sup>31</sup>*Id.* at 886.

<sup>32</sup>*Id.*



every adoption case and the case before us can be no different.”<sup>33</sup> The court further instructed the probate court to “consider all relevant factors before determining what is in the child’s best interest,” and then to exercise its “broad discretion in making the determination” on the adoption petition.<sup>34</sup>

Thus, Mr. B was allowed to adopt his son. As Mr. B’s partner did not seek to adopt the child, the court did not address the legality of that possibility.

It is against this statutory and common-law backdrop that *In re Adoption of Jane Doe* was litigated.

### III. IN RE ADOPTION OF JANE DOE<sup>35</sup>

#### A. Factual Background

Trish Smith and Marcia Jones became life partners in 1981.<sup>36</sup> They were united as a couple in a Quaker union ceremony and consider themselves married in the eyes of their religion even if not recognized in the eyes of the law.<sup>37</sup> After being together about eight years, they decided to bring a child into the world.<sup>38</sup> Their daughter, Jane Doe, was born on July 28, 1990, in Akron, Ohio.<sup>39</sup> Marcia is Jane’s biological mother.<sup>40</sup>

Jane was conceived through artificial insemination at a hospital using a sperm bank.<sup>41</sup> Since the sperm donor was anonymous, there is no biological father of record or in the eyes of the law.<sup>42</sup>

Since Jane’s birth, Marcia and Trish have shared in the parenting responsibilities of the child, and Jane has, by all accounts, flourished under the loving care provided by her parents.<sup>43</sup> For the first few years, Trish financially supported her family so

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<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 889.

<sup>35</sup>Pseudonyms were used throughout the appellate proceedings and in this article to protect identity of the child. The pleadings, motions, court orders and other documents in the probate court record contain the parties’ real names. That record has been sealed to protect the parties’ identities. The sealed record necessitates reliance on the briefs filed at the appellant level to document what occurred at the trial level. Attorneys Peter Cahoon and James Chapman of Akron, Ohio, and Patricia Logue of the Lambda Legal Defense and Education Fund’s Midwest Office served as legal counsel for the petitioners.

<sup>36</sup>Brief for Appellants at 7, *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

<sup>37</sup>Brief for Appellants at 9.

<sup>38</sup>*Id.* at 8.

<sup>39</sup>*Id.* at 7.

<sup>40</sup>*Id.* at 6.

<sup>41</sup>Brief for Appellants at 8; Brief of Guardian Ad Litem at 2, *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

<sup>42</sup>*Id.* See also OHIO REV. CODE ANN. § 3107.07 (West 2000); *In re Adoption of Zschach*, 665 N.E.2d 1070, 1073-74 (Ohio 1996).

<sup>43</sup>Brief for Appellants at 7 - 10.

that Marcia could stay home and care for Jane.<sup>44</sup> Persons acquainted with Trish, Marcia, and Jane through Jane's school, day care, neighbors, faith community, friends and relatives submitted affidavits that they are a happy, healthy family.<sup>45</sup>

Despite this de facto parent-child relationship between Trish and Jane, the two remain total strangers in the eyes of the law. For example, Jane cannot be covered under Trish's health insurance policy – in this case it is an important issue because Jane suffers from ulcerative colitis that requires expensive medication and may require hospitalization from time to time.<sup>46</sup> If anything happens to Marcia, Jane may not be able to obtain insurance due to this pre-existing condition.<sup>47</sup> Also, Trish is a beneficiary to an inter vivos family trust; if Jane were her natural or adopted daughter, Jane could inherit from this trust.<sup>48</sup>

Perhaps more important than health insurance or financial concerns are the psychological benefits and emotional security Jane would have if her relationship with each of her moms is recognized and protected by the law.<sup>49</sup> If legally recognized through adoption, the relationship between Trish and Jane would be preserved, even if Trish and Marcia ever go their separate ways. In that event, the court would decide custody and visitation arrangements; if that happened now, Trish would have a very difficult time trying to even get visitation rights to see Jane<sup>50</sup> and custody is virtually out of the question.

If Marcia becomes incapacitated or dies, necessitating appointment of a guardian for Jane, Trish would be a stranger to Jane in the eyes of the law.<sup>51</sup> In terms of legal

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<sup>44</sup>*Id.* at 8.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 10.

<sup>47</sup>*Id.* at 11.

<sup>48</sup>Brief for Appellants at 11.

<sup>49</sup>*Id.* at 12.

<sup>50</sup>See *Liston v. Pyles*, No. 97APO1-137, 1997 Ohio App. LEXIS 3627 (Franklin Cty. Aug. 12, 1997) (unreported) (asserting that lesbian and/or homosexual partners have neither statutory nor equitable rights to court-ordered visitation with children those partners raised jointly with the birth or other legal parent of the child).

<sup>51</sup>The law allows Marcia to use a power of attorney to designate her intent that Trish be appointed Jane's guardian in the event of Marcia's incapacity; Marcia can also include a testamentary guardianship clause in her will indicating her intent that Trish be made Jane's legal guardian if Marcia dies. Neither of these options guarantees that Marcia's wishes will be followed. Probate courts are not bound to following the testamentary guardianship if the court determines, in its discretion, that such guardianship is not in the best interest of the child. *Henicle v. Flack*, 3 Ohio App. 444 (1914). See generally L.S. Tellier, Annotation, *Function, Power and Discretion of Court Where There is a Testamentary Appointment of Guardian of Minor*, 67 A.L.R.2d 803 (1999). The validity of a durable power of attorney can be challenged on a number of grounds. Issues regarding whether the attorney is acting in good faith are often raised, and transfers of power from the principal to attorney in fact are highly scrutinized by the court to assure fairness and fundamental soundness of the transfer. See, e.g., *In re Scott*, 675 N.E.2d 1350 (Ohio Ct. App. 1996); *Testa v. Roberts*, 542 N.E.2d 654 (Ohio Ct. App. 1988).

standing, any blood relative of Marcia, and thus of Jane, would have superior legal rights regarding Jane even if that person had never met Jane.

*B. Initiation of Adoption Procedures and Probate Court's Ruling*

On October 16, 1996, the parents<sup>52</sup> filed a Complaint for Declaratory Judgment in the Probate Division of the Summit County Court of Common Pleas. The complaint sought a declaration that Trish could adopt Jane so that both parents would have full legal standing as parents. On June 5, 1997, the trial judge denied the relief requested, holding that Trish could not adopt Jane under Ohio law unless the biological mother's (Marcia's) rights were terminated.<sup>53</sup>

The probate court vacated this decision and allowed the parents to amend their declaratory judgment complaint and submit additional briefing as to whether, in the alternative, both parents could jointly adopt Jane upon the simultaneous termination of Marcia's rights as birth mother.<sup>54</sup>

In sum, through the initial and amended complaint for declaratory relief, parents Trish and Marcia asked the probate court to:

- 1) Declare that Trish could adopt Jane without any loss of parental rights to Marcia;<sup>55</sup> or
- 2) Declare that Trish and Marcia could jointly adopt without Marcia relinquishing her parental rights;<sup>56</sup> or
- 3) Declare that Marcia could relinquish her parental rights to Jane instantaneously with the granting of the adoption to both Trish and Marcia.<sup>57</sup>

The probate court appointed a Guardian Ad Litem (hereafter "GAL") to advise the court on legal issues surrounding the adoption.<sup>58</sup> Consistent with the GAL's interpretation of the law, the probate court concluded that Trish met Ohio's statutory requirement of being a suitable person to adopt, but that the adoption would automatically terminate Marcia's parental rights. This decision was based on a strict application of a statutory provision that states: "a final decree of adoption . . . shall have the following effects . . . except with respect to a spouse of the petitioner . . . to relieve the biological . . . parents . . . of all parental rights."<sup>59</sup>

Accordingly, in an opinion issued March 4, 1998, the probate court denied all relief requested by Trish and Marcia. The probate court reasoned<sup>60</sup> that R.C.

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<sup>52</sup>Since Marcia is the biological parent of Jane and Trish is Jane's de facto parent, the term "parents" is used throughout this article to refer collectively to Trish and Marcia.

<sup>53</sup>Brief for Appellants at 7.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 6-7, 11.

<sup>56</sup>*Id.* at 7, 11.

<sup>57</sup>*Id.*

<sup>58</sup>Brief of Guardian Ad Litem at 2, *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

<sup>59</sup>OHIO REV. CODE ANN. § 3107.15(A)(1) (West 2000).

<sup>60</sup>The probate court decision did not use pseudonyms, and all parts of the record that refer to the parties by their real names are sealed. Therefore, references to the probate court's

§ 3107.15(A)(1)<sup>61</sup> allows retention of parental rights of a child by the biological parent only when the spouse of the biological parent, i.e. the stepparent of the child, is adopting the child.<sup>62</sup> In cases such as Jane's, where the person seeking to adopt is not a legally recognized spouse<sup>63</sup> of the biological parent, the probate court interpreted R.C. § 3107.15(A)(1) as automatically terminating the biological mother's rights upon adoption by someone other than the spouse/stepparent. In short, the probate court held that the "stepparent provision" found in R.C. § 3107.15(A)(1) did not prohibit Trish from adopting Jane, but held that this adoption would automatically terminate Marcia's parental rights.<sup>64</sup>

The probate court also rejected the argument advanced by the parents that the appropriate focus on "the best interest of the child"<sup>65</sup> negated application of the stepparent provision to terminate Marcia's rights upon Trish's adoption of Jane.

The probate court provided two reasons for rejecting the parents' argument that the "best interest of the child" mandated approval of this adoption. First, the probate court held that the parents' argument would be more plausible if the case involved an abandoned child or a child without a parent. In that situation, the "best interest of the child" could be employed to avoid strict statutory construction.<sup>66</sup> But since Jane already has one natural parent, the court concluded that the need for adoption is not so critical to the child's best interest. The court reasoned that "[s]ince the child in this case has a natural parent, and the need for an adoptive parent is not as pressing as the non-parent situation, the child's interest must be given less weight when weighed against the clear legislative mandate of R.C. § 3107.15(A)(1)."<sup>67</sup>

Second, the court reasoned that because adoption in Ohio is a creature of statute, strict compliance is necessary, especially where the language is as clear as the stepparent adoption provision of R.C. § 3107.15(A)(1) appeared to this court.<sup>68</sup>

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decision herein are, as evidenced by the accompanying footnotes, based on statements about or summaries of the probate court's decision as presented (1) in the briefs filed with Ninth District Court of Appeals and the Supreme Court of Ohio and (2) in the court of appeal's *In re Jane Doe* opinion published at 719 N.E.2d 1071 (1998).

<sup>61</sup>Brief for Appellants at 7. In relevant part, OHIO REV. CODE ANN. § 3107.15(A)(1) (West 2000) provides that a "final decree of adoption . . . shall have the following effects . . . except with respect to a spouse of the petitioner . . . to relieve the biological . . . parents . . . of all parental rights."

<sup>62</sup>Brief of Guardian Ad Litem at 3.

<sup>63</sup>"Spouse" is not defined in Ohio's adoption statutes. The probate court consulted case law and a dictionary to conclude that "spouse" means "one's husband or wife" and connotes a heterosexual relationship. Brief of Guardian Ad Litem at 3, n.5.

<sup>64</sup>Brief of Guardian Ad Litem at 3; Brief for Appellants at 15.

<sup>65</sup>As previously noted, the "best interest of the child" standard pervades Ohio's statutory adoption scheme. See e.g. OHIO REV. CODE ANN. §§ 3107.11, 3107.14 (West 2000). See also *In re Adoption of Zschach*, 665 N.E.2d 1070, 1073 (1996) ("goal of adoption statutes is to protect the best interests of the child.").

<sup>66</sup>Brief for Appellants at 16.

<sup>67</sup>*Id.*

<sup>68</sup>See *In re Adoption of Jane Doe*, 719 N.E.2d at 1072 (explaining reason of probate court's decision).

The probate court did not explicitly address the parents' independent, alternative argument that Ohio law allows Trish and Marcia, each independently eligible to adopt as an "unmarried adult"<sup>69</sup> under Ohio law, to both adopt Jane upon the simultaneous and instantaneous voluntary termination by Marcia of her parental rights.<sup>70</sup>

### *C. Parents' Arguments in the Court of Appeals*

The parents appealed to the Ohio Court of Appeals for the Ninth District, Summit County, but the appeal was actually heard by three judges from the Fifth District at the request of and on behalf of the Ninth District.<sup>71</sup> The parents raised two assignments of error deserving *de novo* review:<sup>72</sup>

- 1) The trial court erred in holding that it has no authority to grant the adoption of Jane by de facto parent Trish without terminating biological parent Marcia's rights; and
- 2) The trial court erred by failing to declare that it had the authority to let Marcia legally relinquish her rights along with instantaneous adoption of Jane by both Marcia and Trish.<sup>73</sup>

In support of their arguments, the parents directed the appeals court's attention to several Supreme Court of Ohio and Ohio court of appeals decisions where the courts had rejected literal application of the statutory requirements to serve the best interests of a child.<sup>74</sup> Appellants primarily based this argument on cases such as *Summers*,<sup>75</sup> where the Supreme Court of Ohio empowered probate courts to disregard certain statutory bars to an adoption where the adoption was in the child's best interest.

Pairing this ample weight of authority with the best-interest-of-the-child mandate that permeates the letter and the spirit of Ohio's adoption statutes, the parents argued that "literal application of R.C. § 3107.15 is inappropriate because it would not serve the goals of the act, and would produce an unjust result contrary to Jane's best interests."<sup>76</sup> Appellants continued:

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<sup>69</sup>R.C. § 3107.03(B) allows "an unmarried adult" to adopt. Under Ohio's rules of statutory interpretation, references to singular include the plural and vice versa. OHIO REV. CODE ANN. § 1.43(A) (West 2000). Thus, R.C. § 3107.03(B) allows for "unmarried adults" to adopt.

<sup>70</sup>"The court below either did not address these arguments or thought this option foreclosed under the [Ohio adoption] act." Brief for Appellants at 38.

<sup>71</sup>This transfer was made at the request of the Ninth District judges but the reasons for the request remain part of the sealed record.

<sup>72</sup>Brief for Appellants at 5; Appellants Reply Brief at 1-2. The parents argued that *de novo* review was appropriate because the appeal arose from a declaratory judgment action involving questions of law.

<sup>73</sup>Brief for Appellants at 5, *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

<sup>74</sup>Brief for Appellants at 17-22.

<sup>75</sup>As previously noted, the *Summers* court instructed the probate court to disregard the statutory requirement that agency consent be obtained for an adoption. *State, ex rel. Portage Cty. Welfare Dept. v. Summers*, 311 N.E.2d 6, 11-12 (Ohio 1974).

<sup>76</sup>Brief for Appellants at 22.

The provisions of R.C. § 3107.15(A)(1) preserving the rights of a biological or other legal parent in stepparent adoption demonstrates that the legislature already has recognized in comparable circumstances that maintaining a child's legal relationship with her parent serves a compelling and paramount purpose. The same is true here where, from Jane's perspective, the exact same interests are at stake. Even though the legislature may not have had Jane's circumstances in mind [when it enacted R.C. § 3107.15(A)(1)], the court must elevate them above all else in construing the act, particularly when no other person's interests will be infringed.<sup>77</sup>

In short, the parents argued that the court had not only the right, but the duty, to allow Trish's adoption of Jane because it was not prohibited by Ohio law and was in Jane's best interest.

#### *D. Guardian Ad Litem's Role on Appeal*

In her appellate brief, the GAL advised the court that probate court had appointed her to respond to the legal issues raised in the declaratory judgment filed by the parents seeking clarification that Trish was a proper party to adopt Jane.<sup>78</sup> While this is not an unprecedented role for a GAL,<sup>79</sup> it differs from the statutorily designed GAL role as advocate for the child.<sup>80</sup> In fulfilling the task assigned by the court, and in concluding that Jane's adoption should not be allowed as the parents desired, the GAL became an adversary to the parents and arguably to Jane as well. Accordingly, the GAL's role on appeal was directly analogous to that of an appellee defending the lower court's decision.

In urging affirmance of the probate judge's decision, the GAL stated that she did not independently verify the facts presented by the parents in their affidavits and in

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<sup>77</sup>*Id.* at 22 (bracketed material supplied).

<sup>78</sup>Brief of Guardian Ad Litem at 2.

<sup>79</sup>In a New Jersey case, for example, a law professor was appointed to advise the court whether the adoption by a same-sex partner of the biological mother was (1) in the child's best interest and (2) compatible with New Jersey statutory law and public policy. *Adoption of a Child* by J.M.G., 632 A.2d 550, 551 (N.J. Super. Ct. Ch. Div. 1993). The J.M.G. court also appointed a social service agency to make an additional assessment and recommendation as to the child's best interest. *Id.*

<sup>80</sup>Ohio law authorizes appointment of a GAL in cases of abuse or neglect or when a minor faces being adjudged delinquent or unruly and has no parent or guardian to advocate on the child's behalf, OHIO REV. CODE ANN. § 2151.281 (West 2000), and when child custody is at issue in a divorce case. OHIO R. CIV. P. 75. The GAL may be an attorney who serves as legal counsel for the child. OHIO REV. CODE ANN. § 2151.281(H) (West 2000). If a conflict develops in the GAL's efforts to act as factual investigator/advocate and legal counsel, the court can relieve the GAL of her duties as legal counsel and she can continue as a factual investigator and advocate for the child's best interest. *Id.* If the GAL is not an attorney, the court can appoint legal counsel to advise the GAL. *Id.* In sum, "[t]he role of the guardian ad litem is to investigate the ward's situation and then to ask the court to do what the guardian feels is in the ward's best interest." *In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985). If the GAL is also an attorney, the role also includes the duty to "zealously represent" the child's legal rights. *Id.*

briefs regarding Jane's home life, but assumed the facts were true in briefing the legal issues.<sup>81</sup>

The GAL's role as de facto appellee urging affirmance of the lower court's decision resulted in her framing of the issues on appeal very differently than the perspective presented by the parents. The GAL opined that "[t]his case is not about the best interests of the child per se as asserted by Appellants. It is about whether Ohio law allows the adoption they seek."<sup>82</sup> Contrary to the parents' assertion that the appeal involved a declaratory judgment based purely on questions of law, and thus deserving *de novo* review,<sup>83</sup> the GAL claimed that the probate judge's decision was reviewable under an abuse of discretion standard.<sup>84</sup>

The GAL conceded that "[t]here is no question that Trish may adopt Jane under Ohio law" because "[s]he is an 'unmarried adult' who may adopt pursuant to R.C. § 3107.03(B)."<sup>85</sup> The GAL further recognized the Supreme Court of Ohio's decision *In re Adoption of Charles B* that Trish's sexual orientation was not a bar to the adoption.<sup>86</sup> However, the GAL posited that probate court was bound to strictly interpret the statutes,<sup>87</sup> and that the best interest test should not be applied to statutory construction.<sup>88</sup>

The GAL argued:

Appellants confuse the analysis a probate court would apply when considering a petition for adoption with the question of whether two unmarried adults can adopt under the statutes of Ohio as raised in their declaratory judgment complaint. The question of statutory construction is governed by analysis of the applicable statutes using rules of construction. While Appellants devote the majority of their brief to the best interests test, their assertions are premature as the appropriateness of this particular adoption is not yet at issue.<sup>89</sup>

Finally, the GAL claimed that if policy interests required a different law, then it was up to the legislature, not the courts, to make that change after full debate of the policy ramifications.<sup>90</sup>

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<sup>81</sup>Brief of Guardian Ad Litem at 3.

<sup>82</sup>*Id.* at 2.

<sup>83</sup>Brief for Appellants at 5; Appellants Reply Brief at 1-2.

<sup>84</sup>Brief of Guardian Ad Litem at 4.

<sup>85</sup>*Id.* at 3, 7.

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 4, 7.

<sup>88</sup>*Id.* at 7-10.

<sup>89</sup>Brief of Guardian Ad Litem at 7.

<sup>90</sup>*Id.* at 6-7.

*E. Amici Curiae Weigh In*

The Ohio Psychological Association, the National Association of Social Workers (NASW), the Ohio Chapter of NASW, the American Academy of Child & Adolescent Psychiatry, the Ohio Human Rights Bar Association, and the Lesbian/Gay Community Service Center of Greater Cleveland all weighed in as amici curiae favoring the adoption. No amicus briefs opposing the adoption were filed.

Embracing the traditional amici curiae role, these organizations addressed neither the factual issue of whether Jane's adoption by Trish was in the child's best interest nor the legal issue of whether the probate court had misapplied Ohio's statutory adoption scheme. Rather, amici offered empirical data and other relevant information about gay parents and adoptions in an effort to expand the justices' vision as to the impact of the case on families and children in Ohio and elsewhere.

For example, the amici pointed out that lower court's ruling prohibits not just gay partners of people who have children from adopting, but also prevents any unmarried couples from adopting a child.<sup>91</sup> The amici explained that "[b]ecause children today are being raised, and raised well, by grandparents, single parents, lesbian and gay parents, and in other nontraditional family arrangements, standing to file adoption petitions should not be construed so narrowly that children in need of stable, safe homes will not find them."<sup>92</sup>

Amici also explained, again based on strong empirical evidence, that a child's attachment to his or her "psychological parent" is extremely well-documented and important, and that disruption to that relationship for any period of time can be exceedingly detrimental to the child.<sup>93</sup> In turn, allowing adoption by unmarried couples is "an important first step toward protecting the child's psychological ties" to this de facto parent.<sup>94</sup>

In addition to psychological harm, the child may experience material deprivation if the second parent is not allowed to adopt, amici explained.<sup>95</sup> For example, parents covered by separate health insurance plans can choose the coverage that is optimal for the child's needs.<sup>96</sup> If the de facto parent has no will or if a will is invalidated, lost, or successfully contested, Ohio law will protect the ability of an adopted child to inherit through intestate succession.<sup>97</sup> The adoption decree will also make the

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<sup>91</sup>Brief Amicus Curiae of Ohio Psychological Association, National Association of Social Workers and Ohio Chapter American Academy of Child & Adolescent Psychiatry, Ohio Human Rights Bar Association, and The Lesbian/Gay Community Service Center of Greater Cleveland in Support of Appellants at 5, *In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998).

<sup>92</sup>*Id.*

<sup>93</sup>Brief Amicus Curiae at 6.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 8.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* See also OHIO REV. CODE ANN. § 3107.15(A)(2) (West 2000) (the effect of adoption is "to create the relationship of parent and child . . . as if the adopted person were a legitimate blood descendant of the petitioner, for all purposes including inheritance").



child eligible for family trusts<sup>98</sup> and social security death or disability benefits available to the child of a disabled or deceased parent.<sup>99</sup> In contrast, the de facto child remains a stranger in the eyes of the law and is to receive no benefits or inheritance upon the disability or death of the parent.

Amici also pointed out the well-documented need for interpretation of adoption statutes to help expand, rather than restrict, the potential number of homes available for the hundreds of thousands of children in foster homes awaiting placement in permanent homes.<sup>100</sup> Further, amici explained that the concept of what constitutes a family has changed significantly in this culture, and urged the court to make its decision consistent with modern realities of children being raised by step-parents, grandparents, friends, relatives, and gay and lesbian partners of the legally recognized parent rather than relying solely on the prototypical model of family life of a biological mother and biological father.<sup>101</sup> Amici observed:

Other nontraditional family arrangements and alternative methods of creating such families also exist. There are single men and women who are adopting children; gay and lesbian couples who are becoming parents through adoption, foster care, or artificial insemination; divorced parents who are marrying new spouses, and, through the advances of medical science, post-menopausal women who are becoming mothers. Again, as a result of these new family contexts, courts have avoided a narrow definition of "family" and sought to meet the needs of children consistently with the goal of protecting the best interest of the child.<sup>102</sup>

Additionally, amici brought to the court's attention the fact that millions of children<sup>103</sup> are being raised – and raised well<sup>104</sup> – by gay or lesbian parents. Strong empirical data demonstrates that such children are not adversely affected by their

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<sup>98</sup>Brief Amicus Curiae at 8.

<sup>99</sup>*Id.* (citing 42 U.S.C. § 402[d]); *Adoption of Tammy*, 619 N.E.2d 315, 326 (Mass. 1993); *In re Jacob*, 600 N.E.2d 397 (N.Y. 1995); *In re Dana*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of J.M.G.*, 632 A.2d 550, 552 (N.J. Super. Ct. Ch. Div. 1993).

<sup>100</sup>Brief Amicus Curiae at 9.

<sup>101</sup>*Id.* at 10-13.

<sup>102</sup>*Id.* at 12.

<sup>103</sup>*Id.* at 13-25. Amici explained that estimates of the number of children of gay and lesbian parents "range from six million, see J. SCHULENBERG, *GAY PARENTING* (1985), to eight to ten million, see *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 FAM. L. REP. 1512, 1513 (1987), to six to fourteen million, Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992)." Brief Amicus Curiae at 13, n.17.

<sup>104</sup>Authorities amici brought to the court's attention in support of the parenting skills of gay and lesbian parents include Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families*, 32(1) DEV. PSYCHOL. 3 (1996); Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, PEDIATRICS, July 1994, at 41-44; Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD. DEV. 1025 (1992); Patricia J. Falk, *Lesbian Mothers: Psychosocial Assumptions in Family Law*, 44 AM. PSYCHOLOGIST 941 (1989); and FREDERICK W. BOZETT, *GAY AND LESBIAN PARENTS* (1987).

parents' sexual orientation. To the contrary, the data confirm that variances in sexual orientation constitute a healthy aspect of human diversity, that children with gay parents are able to deal with any stigmatization or harassment just as children of other minorities do, that children raised by gay men and lesbian women are not more likely to become homosexuals than children raised by heterosexuals, and that there is no connection – other than outdated myths – between sexual orientation and child sexual abuse.<sup>105</sup>

#### *F. Court of Appeals Decision*

The appellate court rejected the arguments of the parents and amici, holding that the court below had not erred in (1) applying R.C. § 3107.15(A)(1) to determine that Trish could not adopt Jane without terminating Marcia's parental rights; and (2) ruling that Ohio law did not allow Marcia and Trish to jointly adopt Jane upon Marcia's instantaneous relinquishment of her parental rights to Jane.<sup>106</sup>

The appeals court determined that Trish met the requirements of "an unmarried adult" allowed to adopt under R.C. § 3107.03(B)<sup>107</sup> and that no statutory provisions barred her adoption of Jane. But in the appeals court's view, "the gravamen of this appeal is what the effect of an adoption by appellant, 'an unmarried adult,' is on the parental rights of the biological mother"<sup>108</sup> pursuant to R.C. § 3107.15(A)(1) – a classic "step-parent" provision.<sup>109</sup>

The court either did not consider, or considered but rejected without explanation, the possibility that the stepparent provision was inapplicable to the facts of the case. Rather, the court viewed R.C. § 3107.15(A)(1) as establishing a bright-line, universally applicable rule "that a final decree of adoption issued by an Ohio court has the effect of terminating all parental rights of biological parents and creating parental rights in adoptive parents."<sup>110</sup>

In reaching this conclusion, the appeals court agreed with the probate court and GAL that since adoption is a creature of statute rather than of common law, the courts must strictly construe the statutory provisions governing adoption.<sup>111</sup> Braced with this perspective, the court rejected the parents' and amici's argument that Ohio's adoption statutes and Supreme Court of Ohio precedent allowed, if not required, an analysis and interpretation of the adoption statute on a case-by-case

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<sup>105</sup>Brief Amicus Curiae at 13-25.

<sup>106</sup>*In re Adoption of Jane Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998). Although not explicitly articulated in its ruling, the Court of Appeals reviewed the case on a *de novo* rather than an abuse of discretion standard.

<sup>107</sup>*Id.* at 1072.

<sup>108</sup>*Id.*

<sup>109</sup>*See, e.g., In re Baby Z*, 724 A.2d 1035, 1057 (Conn. 1999); *Bates v. Sanchez*, 375 N.W.2d 353, 354 (Mich. 1985). *See generally* Barbara Findlay, *All in the Family Values*, 14 CAN. J. FAM. L. 129 (1997).

<sup>110</sup>719 N.E.2d at 1072.

<sup>111</sup>*Id.* The court later added: "we are adhering to the maxim 'adoption statutes are in derogation of common law and therefore must be strictly construed . . .'" 719 N.E.2d at 1073, quoting *In re Adoption of Zschach*, 665 N.E.2d 1070, 1076 (Ohio 1996).

basis, and also rejected their argument that courts had the power to decline to apply the literal language of the statutory provisions when doing so is in a particular child's best interests.<sup>112</sup>

The appeals court distinguished the Ohio precedent relied upon by appellants by reasoning that previous cases allowing lower courts to decline to apply the literal language of a provision in the adoption statute "emphasized the trial court's discretion in determining eligibility to adopt,"<sup>113</sup> while it characterized the case before it as involving only "the effects of adoption."<sup>114</sup> The court characterized the distinction between eligibility and effect as a "tremendous trifle" that was the determinative factor in the case.<sup>115</sup> It explained:

Although we are mindful of the dilemma facing the parties and are sympathetic to their plight, it is not within the constitutional scope of judicial power to change the face and effect of the plain meaning of R.C. § 3107.15. This case is not about alternative lifestyles but statutory construction. When we balance the spirit and motivation of the adoption laws (as appellant argues) against the plain meaning of the statutory language created by the state legislature, we are not empowered to find the 'spirit' includes the issue presented sub judice.

Appellant argues we should use the best interest of the child test in interpreting the statute. We find to do so would place the 'cart before the horse.' Best interest pertains to the adoption process, not to the legal effects of adoption. Based on the clear meaning of R.C. § 3107.15(A), we find the trial court did not err in finding the biological mother's parental rights would terminate upon adoption of the child by appellant, a non-stepparent.<sup>116</sup>

As to the issue of whether Marcia could voluntarily terminate her rights simultaneously with the court granting a joint adoption by her and Trish, the court said this issue was moot in light of its previous holding.<sup>117</sup>

One member of the tribunal penned a concurrence to emphasize his belief that the case presented a matter for the legislature, not the courts:<sup>118</sup>

Until such time as the General Assembly of Ohio changes the law pertaining to same-sex marriages or rewrites the adoption statutes to specifically allow the requested legal relationship, I cannot interpret into the existing adoption statute a spousal relationship between two

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<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* This was the position advocated by the GAL. See Brief of Guardian Ad Litem at 9.

<sup>115</sup>719 N.E.2d at 1073.

<sup>116</sup>*Id.*

<sup>117</sup>*Id.* at 1073.

<sup>118</sup>*Id.* (Wise, J., concurring).

individuals of the same sex such as to create a step-parent relationship in a legal context.<sup>119</sup>

### *G. Seeking Review by the Supreme Court of Ohio*

#### 1. The Parents' Arguments in Support of Jurisdiction

The parents had no appeal as a right to the Supreme Court of Ohio. Rather, they had to convince the court, by filing a memorandum in support of jurisdiction, that their case presented issues "of public or great general interest."<sup>120</sup>

The parents argued that further review of this case was of great public interest because the result effected a gross injustice to Jane and children similarly situated. It deprived such children of the emotional and financial security that would accompany adoption by a second (non-spousal) parent.<sup>121</sup> It is also of great public interest, the parents contended, to "restore the probate courts to their paramount position as protectors of children in adoption proceedings."<sup>122</sup> "Trial courts in at least sixteen other states have approved such adoptions, and many thousands of couples nationally have secured their child's best interests through this mechanism," the parents wrote, adding that "Ohio children are no less in need of this vital legal safeguard."<sup>123</sup> They further argued:

American society is awash in discussion of the needs of changing families and the rights of its gay and lesbian citizens. This court has set an enviable standard in past cases for deciding these issues dispassionately, in the light of the best interests of the children before it, proven facts and the application of settled law. That is all appellants ask here.<sup>124</sup>

Touching on the merits of the case, the parents asserted that the trial and appellate courts' interpretation of R.C. § 3107.15(A)(1) was incorrect because they constituted "slavish application of the literal terms of Ohio statutes" without due regard of the "unjust and unreasonable results" in this and similar cases.<sup>125</sup> The parents also argued that any barriers to Jane's adoption presented by the stepparent

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<sup>119</sup>*Id.*

<sup>120</sup>OHIO SUP. CT. R 3. Memos in support of jurisdiction put an attorney's advocacy skills to the test. The primary objective is, of course, to convince the court that the case is of significant public interest. But the memorandum also presents an opportunity to make preliminary arguments as to the merits of the appeal. Compelling preliminary arguments on the merits, in turn, may inspire the court to take the case to correct an injustice, to clarify the law, or to establish new standards in a given area of law, because accomplishing such tasks is so clearly in the public's interest.

<sup>121</sup>Memorandum in Support of Jurisdiction of Appellants Trish Smith and Marcia Jones. *In re Adoption of Jane Doe*, 86 Ohio St.3d 1408 (Ohio 1999) (hereinafter "Appellants' Memorandum in Support").

<sup>122</sup>Appellants' Memorandum in Support at 2.

<sup>123</sup>*Id.* at 3.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.* at 6.

statute were, contrary to the decisions of the courts below, irrelevant to the issue of the parents' ability to jointly adopt Jane upon the simultaneous relinquishment by the biological mother's parental rights.<sup>126</sup>

## 2. The Amici Perspective

The Amici enumerated six reasons that the case satisfied the court's "public or great general interest" criteria.<sup>127</sup> These grounds included providing the court with the opportunities "to reinvigorate the 'best interest of the child' mandate,"<sup>128</sup> to "preempt repetitive and perhaps conflicting efforts by the lower courts in Ohio" adjudicating second-parent adoption cases,<sup>129</sup> to establish the right for Jane and children similarly situated to "have two parents legally obligated to care for them,"<sup>130</sup> and to "forge a leadership role in the development and evolution of family law jurisprudence that recognizes the realities of children's lives."<sup>131</sup>

The Amici Memorandum also provided, in significantly condensed manner, empirical data on the value of two-parent households and the excellent quality of life enjoyed by children of same-sex couples.<sup>132</sup>

## 3. The GAL's Opposition to Further Review

The GAL asserted that the case was not of great public interest because "[t]he great public interest debate they [appellants] seek to wage is a matter of public policy soundly lodged in the province of the legislature."<sup>133</sup> The GAL cited the presence of Amici as evidence that "there may be a significant number of interested parties who should have the opportunity to weigh in on the public policy issues associated with the extension of the adoption laws."<sup>134</sup>

In defending the merits of the decisions below, the GAL made two arguably incongruous arguments.<sup>135</sup> First, the GAL argued that this was a declaratory judgment matter, not an adoption case, and therefore the "best interest of the child" standard was not applicable. "This is not an adoption case; it is a declaratory judgment action in which the Appellants urge the courts to judicially legislate," the

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<sup>126</sup>*Id.* at 13-14.

<sup>127</sup>Memorandum in Support of Jurisdiction Submitted in Support of Appellants by Amicus Curiae, *In re* Adoption of Jane Doe, 86 Ohio St.3d 1408 (Ohio 1999) (hereinafter "Amici Memorandum").

<sup>128</sup>Amici Memorandum at 5.

<sup>129</sup>*Id.*

<sup>130</sup>*Id.* at 5-6.

<sup>131</sup>*Id.* at 6.

<sup>132</sup>*Id.* at 7-14.

<sup>133</sup>Memorandum in Response to Appellants' Memorandum in Support of Jurisdiction, *In re* Adoption of Jane Doe, 86 Ohio St.3d 1408 (Ohio 1999) (hereinafter "GAL'S Memorandum").

<sup>134</sup>*Id.*

<sup>135</sup>See GAL's Memorandum.

GAL wrote. Thus, "[t]he best interests of the child test, while appropriate in an adoption case, is not appropriate in the action filed by Appellants."<sup>136</sup>

Second, the GAL opined that since the adoption law governing disposition of this case is in derogation of common law, adoption statutes must be strictly and narrowly construed.<sup>137</sup> "The court of appeals found that R.C. § 3107.15(A)(1) was not ambiguous in its language or meaning and, therefore, must be followed," the GAL opined.<sup>138</sup> Since strict construction is mandated in this case, the GAL further reasoned, "[u]nmarried partners cannot defeat the plain meaning of R.C. § 3107.15 by jointly adopting after the natural parent relinquishes her parental rights."<sup>139</sup>

Thus, the GAL's circular reasoning left the parents (and others similarly situated) in a dizzying legal predicament. Pursuant to the GAL's logic, the parents could not utilize their most compelling argument based on Jane's best interest, since the best interest provision in the adoption statute governs adoption petitions only and not declaratory judgment actions regarding adoption matters. But having been denied use of the "best interest" language in the adoption statute, another provision of the adoption statute – the so-called step-parent provision – would be strictly construed against them to deny Tricia's adoption of Jane unless Marcia's rights were terminated.

#### *H. Decision of Supreme Court of Ohio Declining Jurisdiction*

On April 28, 1999, the Supreme Court of Ohio denied the appeal without an opinion.<sup>140</sup> Three of the seven justices dissented both from the original denial<sup>141</sup> and from the court's subsequent rejection of the parents' motion for reconsideration.<sup>142</sup>

Since the Supreme Court of Ohio offered no insight as to the justices' reasons for denying review, it is difficult to read anything into its decision. In fact, it is not even safe to assume that the three justices who favored review were inclined to take the case for the purpose of reversing rather than affirming the lower court decisions. In any event, the decision not to hear the case finally resolves the matter as to Marcia, Trish, and Jane, but it is not an affirmance per se. Thus, it does not create binding statewide precedent.

#### IV. FLAWS IN THE TRIAL AND APPELLATE COURT DECISIONS

The resolution of *In re Jane Doe* is a classic example of courts missing not only the boat but the entire harbor as well. This navigational error is due to fundamental flaws in application of general rules of statutory interpretation.

As the court of appeals noted, "[t]his case is not about alternative lifestyles but statutory construction."<sup>143</sup> This is true. But error arose in the court's analysis of the

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<sup>136</sup>GAL's Memorandum at 1.

<sup>137</sup>*Id.* at 2.

<sup>138</sup>GAL's Memorandum at 6; *see also id.* at 6-9.

<sup>139</sup>*Id.* at 4.

<sup>140</sup>*In re Adoption of Jane Doe*, 709 N.E.2d 173 (Ohio 1999).

<sup>141</sup>Justices Moyer, Douglas and Pfeifer dissented from the denial of the appeal. *Id.*

<sup>142</sup>*In re Adoption of Jane Doe*, 711 N.E.2d 234 (Ohio 1999).

<sup>143</sup>719 N.E.2d at 1073.

case as if only one rule of statutory interpretation exists, to wit, that strict construction is required where statutes create rights nonexistent at common law. Other rules of equal or even greater influence should have informed the court's decision in this case.

Ohio's "cardinal rule" of statutory interpretation "is that all statutes relating to the same general subject matter must be read in para materia."<sup>144</sup> Words and phrases are given their common meaning unless they have been assigned or have acquired a technical or particular meaning.<sup>145</sup> Presumptions that accompany the enactment of legislation include that the "entire statute is intended to be effective" and "a just and reasonable result is intended."<sup>146</sup> If a statute is ambiguous, the courts determine an appropriate construction by consulting "among other things, the common law, the object sought to be attained by the legislature, and the consequence of a particular construction."<sup>147</sup> Conversely, where a "statute conveys a meaning that is clear, unequivocal and definite,"<sup>148</sup> the court's "interpretative effort is at an end, and the statute must be applied accordingly."<sup>149</sup> However, strict compliance with a statute is not required where the statute itself is clearly inapplicable to the facts of the case.<sup>150</sup> Finally, a "statute should not be interpreted to yield an absurd result."<sup>151</sup> Accordingly, a court should reject statutory interpretation that yields "any absurd consequences, manifestly contradictory to common reason" or that produces "consequences of great absurdity or injustice."<sup>152</sup>

As the courts and the parties readily conceded in this matter, adoption is a creature of statute, and thus strict statutory construction is one of the rules that guide the court's decision-making process in this case. But the interpretation adopted by the lower courts "strictly construes" Ohio's adoption statutes in a manner that directly violates several equally compelling rules of statutory construction articulated above.

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<sup>144</sup>Yonkings v. Wilkinson, 714 N.E.2d 394, 396 (Ohio 1999).

<sup>145</sup>OHIO REV. CODE ANN. § 1.42 (Anderson 2000).

<sup>146</sup>OHIO REV. CODE ANN. § 1.47 (Anderson 2000).

<sup>147</sup>Christe v. GMS Mgt. Co. Inc., 726 N.E.2d 497, 499 (Ohio 2000) (citing R.C. § 1.49).

<sup>148</sup>City of Lancaster v. Fairfield Cty. Budget Comm., 699 N.E.2d 474, 476 (Ohio 1998) (quoting Provident Bank v. Wood, 304 N.E.2d 378, 381 (Ohio 1973)).

<sup>149</sup>*Id.*

<sup>150</sup>*See, e.g.,* State v. Nagel, 703 N.E.2d 773, 778 (Ohio 1999) (as a general rule, a defendant's waiver of the right to have "criminal proceedings" heard by a jury does not apply to a waiver only relevant to the sentencing phase of the trial).

<sup>151</sup>Mishr v. Bd. of Zoning Appeals, 667 N.E.2d 365, 367 (Ohio 1996) (citations omitted).

<sup>152</sup>Slater v. Cave, 3 Ohio St. 80, 83-84 (Ohio 1853). For an excellent discussion of the absurd results principle, *see* Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. LAW REV. 127 (1994).

*A. Applying Statutory Provisions in Para Materia*

General rules of statutory construction require that related provisions of a statutory scheme be read in conjunction with each other to achieve the legislature's intent. Moreover, and as the court of appeals noted here, OHIO REV. CODE § 3107.14 explicitly demands that "adoption matters must be decided on a case-by-case basis through the able exercise of discretion by the trial court giving due consideration to all known factors in determining what is in the best interest of the person to be adopted."<sup>153</sup> The supremacy of the "best interest of the child" provision has been recognized by the Supreme Court of Ohio in decisions that have overridden literal statutory requirements – such as the requisite approval of the adoption agency – when it is in the adoptee's best interest to do so.<sup>154</sup>

Thus, the court of appeal's reasoning that focuses on the best interest of the child "would place the 'cart before the horse'"<sup>155</sup> is simply incorrect. To the contrary, both the legislation itself and the interpretation of the statute by the state's highest court instruct Ohio courts to do exactly what the appeals court refused to do here: always place the best interest of the child first.<sup>156</sup>

The court of appeals defends its decision by distinguishing between statutory provisions that set the standards for assessing the *merits* of an adoption petition and the provision that governs the *effects* of the adoption.<sup>157</sup> But what the appeals court ignores is that all these provisions are part of a single, unified statutory scheme that the Supreme Court of Ohio has repeatedly recognized as being legitimately implemented in furtherance of the best interests of the child. Thus, provisions governing the "effects" of adoption are equally entitled to interpretation under the best interests of the child standard.

In addition, the court of appeal's interpretation of the statute as terminating Marcia's parental rights upon Jane's adoption by Trish extracts a result identical to denying the adoption petition on the merits. The difference is that the court's decision predicated on the effects of the adoption creates a *de facto* bar to Jane's adoption by Trish, while a ruling on the merits creates a legal bar. But, a bar is a bar, regardless of the adjective that proceeds it. In short, the court's differential treatment of the "merits" and the "effects" provisions of Ohio's adoption statutes fabricates a distinction where there is no difference.

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<sup>153</sup>*In re Jane Doe*, 719 N.E.2d at 1072.

<sup>154</sup>*State ex rel. Portage County Welfare Dept. v. Summers*, 311 N.E.2d 6, 11-12 (Ohio 1974).

<sup>155</sup>719 N.E.2d at 1073.

<sup>156</sup>The irrefutable facts of this case show that Trish and Marcia are excellent parents, and that Trish's adoption by Jane would be in Jane's best interest. See text and accompanying pages 13-16. And while readily acknowledging that every adoption case must be judged on its own merits, the amicus curiae provided empirical, sociological and psychological data demonstrating that second-parent, same-sex adoptions significantly benefit the child's mental and physical well-being.

<sup>157</sup>*In re Jane Doe*, 719 N.E.2d at 1073.



*B. Obtaining the Legislature's Objectives*

The position adopted by the courts below that R.C. § 3107.15(A)(1) is unambiguous and must be literally applied to strip Marcia of her parental rights if Trish adopts Jane overlooks another critical threshold step in statutory application. That is, the statute neither expressly addresses, nor by its language remotely suggests, that it covers same-sex, second-parent adoptions. Therefore, it is simply irrelevant to the issues raised by second-parent adoptions.<sup>158</sup> The statute's inapplicability is one of the reasons that its application here runs contrary to the legislature's intent in adopting Ohio's statutory adoption scheme.

R.C. § 3107.15(A)(1) terminates "all parental rights and responsibilities" of any "biological or other legal parents of the adopted person." If this constituted the whole of R.C. § 3107.15(A)(1), then the lower court's interpretation of the statute as terminating biological mother Marcia's parental rights to Jane upon Trish's adoption of Jane might be appropriate.

But R.C. § 3107.15(A)(1) does not make such a universal statement. Rather, it contains an important phrase limiting its applicability to the termination of parental rights accompanying an adoption. That is, R.C. § 3107.15(A)(1) terminates parental rights "[e]xcept with respect to a spouse of the petitioner and relatives of the spouse." This language has led courts, litigants and commentators to refer to such provisions as "the step-parent provision."<sup>159</sup>

The plain language of this exception makes clear that the scenario the legislature intended R.C. § 3107.15(A)(1) to address does not exist in this case, nor does it exist in any case where there is only one "legal" parent of the child. The scenario contemplated by the statute is where *two* persons (usually both biological parents) *already* possess parental rights and responsibilities, and a third party petitions to adopt the child. In fact, this scenario represents the most common form of adoption in America.<sup>160</sup> Absent the termination effect in R.C. § 3107.15(A)(1), the child would have three legally recognized parents. The Ohio legislature has apparently decided that this is not a desirable result,<sup>161</sup> and it is not alone in that decision.

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<sup>158</sup>In this respect the step-parent provision is akin to other provisions in Ohio adoption law, such as the requirement that consent be obtained from an agency who has permanent custody of the child, or that a putative father be notified of a proposed adoption that will terminate his parental rights.

<sup>159</sup>See, e.g., *In re Baby Z*, 724 A.2d 1035, 1057 (Conn. 1999); *Bates v. Sanchez*, 375 N.W.2d 353, 354 (Mich. 1985). See generally Barbara Findlay, *All in the Family Values*, 14 CAN. J. FAM. L. 129 (1997).

<sup>160</sup>Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1020, n.5 (1999).

<sup>161</sup>Although one might argue that having more than two persons legally responsible for a child would be in the child's best interest, potential downsides to such a scenario are obvious. Having three (or more) people with equal parental rights in the eyes of the law, who may have some animosity toward each other based on the break up of past marriages or relationships, could result in repeated visits to the court over disputes such as the religious training the child should receive, the educational path to be followed, whether a particular course of medical treatment should be pursued, and other issues intrinsic to child rearing. In short, there is some wisdom in the law limiting the chorus of voices that have standing regarding the critical decisions attendant to raising children.

Indeed, "courts have acknowledged that allowing one or both of the biological parents to retain parental rights would greatly complicate raising the child without affording a benefit to justify the complication"<sup>162</sup> in cases where the adoption would already create two legal parents.

The critical point overlooked by the court of appeals is that in such step-parent situations, R.C. § 3107.15(A)(1) *preserves*, rather than *terminates*, the rights of the existing legal parent who supports the adoption of her child by the petitioner. Thus, the court's application here of R.C. § 3107.15 to terminate the rights of the sole existing legal and biological parent is antithetical to the purpose of a statute that seeks to ensure – through the preservation of one existing legal relationship and the creation of another – two legal parents for the adopted child.

The court of appeal's interpretation of R.C. § 3107.15(A)(1) as mandating termination of Marcia's rights is contradicted by the very Supreme Court of Ohio cases that the court of appeals cites in support for its "strict construction" holding. Collectively, *Kaylor v. Bruening*,<sup>163</sup> *Smith v. Smith*,<sup>164</sup> and *In re Adoption of Greer*<sup>165</sup> recognize that R.C. § 3107.15(A) terminates the rights of some biological parents. These cases do not hold, however, as the court of appeals suggests,<sup>166</sup> that *all* biological parents' rights are terminated.<sup>167</sup> To the contrary, two of these cases – *Kaylor* and *Greer* – are stepparent situations. In both those cases the parental rights of the biological parent who is a spouse of the petitioner are expressly preserved. Moreover, the court in each case construed R.C. § 3107.15(A)(1) narrowly in light of constitutional, statutory, and case law that demand protection "of the right of the natural parents to raise and nurture their children."<sup>168</sup> The court in these cases expressly sought to further the "noble objective" of preserving the child-parent relationship, a relationship that the court characterized as "a bond which constitutes one of the most fundamental relationships upon which our society is based."<sup>169</sup>

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<sup>162</sup>Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1022 (1999) (footnote omitted).

<sup>163</sup>684 N.E.2d 1228 (Ohio 1997).

<sup>164</sup>662 N.E.2d 366 (Ohio 1996).

<sup>165</sup>638 N.E.2d 999 (Ohio 1994).

<sup>166</sup>719 N.E.2d at 1072.

<sup>167</sup>Both *Greer* and *Kaylor* are classic step-parent adoptions where the right of the biological parent married to the petitioner were preserved rather than destroyed by the adoption.

<sup>168</sup>*Greer*, 638 N.E.2d at 1005.

<sup>169</sup>*Greer*, 638 N.E.2d at 1003. Thus, in *Greer*, the court held that a putative father's right to contest adoption by the biological mother's spouse was not waived by failing to file an objection within thirty days as required by a strict reading of the applicable statute. In *Smith*, the court held that an adoption petition approved by South Africa upon consent of one biological parent may be contrary to the law and public policy of Ohio, thus denying the South African judgment full faith and credit.

The foregoing analysis does not suggest, as one of the court of appeals judges feared,<sup>170</sup> that the step-parent provision protects Marcia's parental rights because Trish qualifies as a "spouse" of Marcia. To the contrary, Trish is qualified to adopt Jane because she meets the statutory requirement of being "an unmarried adult"<sup>171</sup> who cannot, in Ohio, be recognized as Marcia's spouse.<sup>172</sup> Rather, the usual effect of R.C. § 3107.15(A)(1) to limit a child to two legal parents, demonstrates that the legislature did not intend the biological mother's rights to be terminated in the scenario presented in *In re Jane Doe*. Simply stated, "the law accords protections to a natural parent when the adoption of a child is proposed."<sup>173</sup> This shield is designed to protect a child such as Jane by providing two legally recognized parents. It should not, therefore, be used as a sword to sever Jane's legal relationship with her biological parent.

### C. Avoiding Absurd Results

Invoking any provision of Ohio adoption statutes to sever the legal relationship between a child and a biological mother who has been and intends to continue being an excellent parent is absurd when weighed against the intent of the legislature to create loving, stable homes, frequently consisting of two parents, for children. This absurd result can and should be avoided.

Courts outside of Ohio have taken this path. In a 1993 decision,<sup>174</sup> for example, Vermont's highest court refused to apply that state's statutory step-parent provision to terminate the parental rights of the birth mother upon adoption of her two-children by the mother's same sex partner. The court reasoned:

The intent of the legislature was to protect the security of family units by defining the legal rights and responsibility of children who find themselves in circumstances that do not include two biological parents. Despite the narrow wording of the step-parent exception, we cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner. Such a narrow construction would produce the unreasonable and irrational result of defeating adoptions that are otherwise indisputably in the best interests of children.<sup>175</sup>

A New York court reached the same conclusion, recognizing that enforcement of New York's step-parent provision to terminate the biological partner's rights "would be an absurd outcome which would nullify the advantage sought by the proposed adoption: the creation of a legal family unit identical to the actual family setup."<sup>176</sup>

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<sup>170</sup>719 N.E.2d at 1073 (Wise, J., concurring).

<sup>171</sup>*Id.* at 1072.

<sup>172</sup>*Id.* at 1073 (Wise, J., concurring).

<sup>173</sup>*Smith*, 662 N.E.2d at 369.

<sup>174</sup>*Adoptions of B.L.V.D. and E.I.V.B.*, 628 A.2d 1271 (Vt. 1993).

<sup>175</sup>*Id.* at 1274.

<sup>176</sup>*In re Evan*, 583 N.Y.S.2d 997, 1000 (N.Y. Sur. Ct. 1992).

Accordingly, Ohio courts should hold that R.C. § 3107.15(A)(1) has no application to same-sex, second parent adoptions.

An alternative, equally defensible analysis pursuant to the rule of statutory construction prohibiting absurd results entails holding the step-parent provision applicable by analogy. In that application, Marcia is deemed directly analogous to the "spouse" excepted from the parental termination effects of R.C. § 3107.15. Thus, Marcia's parental status is unaffected by Trish's adoption of Jane. Ohio cases such as *Lawson v. Atwood*<sup>177</sup> provide precedent for such an analysis.

The *Lawson* plaintiff sought recovery under the Ohio Wrongful Death Statute<sup>178</sup> for the death of Gina Lawson, an 18-year-old he had raised as his own child. The court described the relationship between Lawson and his decedent, Gina Lawson, as follows:

The evidence is undisputed that Gina, from age two until her death sixteen years later, lived with appellant, and that he loved her and treated her as if she were his natural child. He received Gina's society, companionship, and filial obedience. He represented Gina to the world as his child and he received the benefits of her love and affection as though he were her natural father.<sup>179</sup>

Following Gina's death in an automobile accident, plaintiff initiated a wrongful death suit against the driver and the owner of the other vehicle. The trial court granted and the court of appeals affirmed summary judgment for defendants because plaintiff had never adopted Gina, and thus was not a legally recognized "parent" entitled to a remedy for her death under the literal language of the statute.<sup>180</sup> The Supreme Court of Ohio unanimously reversed.

In recognizing plaintiff's standing to pursue the claim, the court characterized the wrongful death act as remedial in nature. Being remedial, it "must be construed to promote the objectives of the Act and to assist the parties in obtaining justice."<sup>181</sup> The court recognized three objectives of the Act: "(1) to compensate those who have been deprived of a relationship, (2) to ensure that tortfeasors bear the cost of wrongful acts, and (3) to deter harmful conduct which may result in death."<sup>182</sup>

The court rejected the doctrine of "equitable adoption" as grounds for recognizing plaintiff's standing, stating that "indiscriminate application of such a

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<sup>177</sup>536 N.E.2d 1167 (Ohio 1989).

<sup>178</sup>OHIO REV. CODE ANN. § 2125.01-.02 (West 2000). The statute allows designated parties to sue for an intentional or negligent act of another that results in death. OHIO REV. CODE ANN. § 2125.01 (West 2000). The action is brought in the name of the personal representative of the decedent "for the exclusive benefit of the surviving spouse, the children, and parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent." OHIO REV. CODE ANN. § 2125.02 (West 2000).

<sup>179</sup>536 N.E.2d at 1169.

<sup>180</sup>*Id.* at 1168.

<sup>181</sup>*Id.* (citations omitted).

<sup>182</sup>*Id.* (citations omitted).

broad legal principle is not desirable.”<sup>183</sup> The court also acknowledged “a dearth of authority to guide our application of the Ohio Wrongful Death Act to the facts of this case.”<sup>184</sup> Thus, the purpose of the statute – “to permit a recovery from the tortfeasor for the loss occasioned by the wrongful death”<sup>185</sup> – was the sole guide the court had for determining whether the statutory specification of “parent” includes persons similarly situated to the plaintiff.

The court concluded that the purpose of the statute was furthered by allowing plaintiff and others similarly situated to pursue a wrongful death claim, provided that plaintiffs “established a parental relationship by clear and convincing evidence.”<sup>186</sup> The court further articulated a four-factor test for establishing the requisite child-parent relationship. The test requires proof that the plaintiff had “performed the obligations of parenthood for a substantial period of time,”<sup>187</sup> and that “[t]he relationship between the child and the one claiming to be parent had been publicly recognized.”<sup>188</sup>

*Lawson* is instructive to the court’s analysis of *In re Jane Doe* for at least four reasons. First, both the adoption and wrongful death statutes create rights and remedies unknown at common law.<sup>189</sup> Thus, strict construction of the statutes’ provisions is implicated. Second, the statutes in each case are remedial in nature.<sup>190</sup> As a general rule, remedial statutes are liberally construed.<sup>191</sup> This second factor militates against absolute strict construction that narrows the remedies provided under the statutes.<sup>192</sup> Third, both statutes are predicated on a traditional family model

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<sup>183</sup>*Id.* at 1169.

<sup>184</sup>536 N.E.2d at 1169.

<sup>185</sup>*Id.*

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* at 1170.

<sup>188</sup>*Id.*

<sup>189</sup>At common law, remedies for personal injuries died with the person who suffered them. Accordingly, the right to sue for wrongful death in Ohio is a statutorily created right that was not recognized at common law. *Rubeck v. Huffman*, 374 N.E.2d 411 (Ohio 1978).

<sup>190</sup>In the wrongful death situation, the statute provides a remedy for the death of a loved one; in adoption matters, the remedy sought is establishing one or more legally recognized parent responsible for the care and well being of a child.

<sup>191</sup>*Lawson*, 536 N.E.2d at 1168. See also *Barker v. State*, 402 N.E.2d 550 (Ohio 1980) (statute that is remedial in nature should be given liberal construction to assist parties in obtaining justice); *Lorms v. State*, 357 N.E.2d 1067 (Ohio 1976) (same); *McKenzie v. Racing Comm.*, 215 N.E.2d 397 (Ohio 1966) (same).

<sup>192</sup>The *Lawson* decision omits any reference to the Wrongful Death Act as being in derogation of common law, thus requiring strict construction, while the *In re Jane Doe* decision omits any reference to adoption statutes being remedial in nature, thus requiring liberal construction. These omissions are interesting in light of the characterizations of these statutes in Supreme Court of Ohio cases. See, e.g., *In re Zschach*, 665 N.E.2d at 1076 (“strict construction does not require that we interpret statutes in such a manner that would mandate an unjust or unreasonable result,” especially one contrary to the best interest of the child).

that is incongruent with the realities of modern-day families.<sup>193</sup> Fourth, the key terms at issue – “parent” in *Lawson* and “spouse” in *In re Jane Doe* – are not defined in the statutes or by judicial precedent to encompass the parties before the courts.

Absent express statutory definitions or common meaning of words that offer clarity when a statute is applied to a situation not contemplated by the legislature, the intent of the legislature is the guiding principle in statutory interpretation and application. This principle was clearly effectuated by the unanimous Supreme Court of Ohio’s decision in *Lawson* to equate the plaintiff – a de facto parent – with a legally recognized parent based on the classical parental role he played during the child’s lifetime. The same principle was entirely and inappropriately abandoned by the courts in *In re Janè Doe*, despite Trish and Marcia’s long-standing relationship and continued commitment as Jane’s parents. Surely, legal recognition of a child-parent relationship in cases like Jane’s, where the parties will receive a lifetime of peace of mind and emotional and financial security through this recognition, is at least of equal value to legal recognition of a child-parent relationship upon the death of a child for the purpose of providing monetary compensation (albeit totally inadequate) for the parent’s loss.

#### *D. Declaring a Live Issue Moot*

As noted previously, the parents presented an alternative, independent argument to the probate and appeals courts: Jane’s best interests could be furthered, and adoption laws fully satisfied, if Marcia voluntarily relinquished her parental rights to Jane and then immediately re-established that child-parent relationship through the adoption of Jane by both Marcia and Trish. Both courts held that this issue was moot in light of their decisions that the stepparent provision of R.C. § 3105.15(A)(1) prohibited Trish from adopting without automatically terminating Marcia’s legal relationship. Both courts were wrong in declaring this issue moot.

“Unless an assignment of error is made moot by a ruling on another assignment of error,” an Ohio appeals court must “decide each assignment of error and give reasons in writing for its decision.”<sup>194</sup> Clearly, a court has no duty to fully address an assignment of error when it is rendered moot by the court’s previous discussion or where some other intervening factor has negated the issue.<sup>195</sup> “Actions become moot when resolution of the issues presented is purely academic and will have no practical effect on the legal relations between the parties.”<sup>196</sup>

The parents’ second assignment of error was not “purely academic,” as it would create new legal relationships among the parties in this case. Marcia’s status as Jane’s biological mother would terminate, but be immediately replaced with the child-parent relationship between Jane and her “new” parents, Marcia and Tricia.

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<sup>193</sup>As recently recognized by the United States Supreme Court, “[t]he demographic changes in the past century make it difficult to speak of an average American family.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). See also JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* (1996).

<sup>194</sup>OHIO APP. R. 12(A)(1)(c).

<sup>195</sup>See, e.g., *Miner v. Witt*, 92 N.E. 21 (Ohio 1910).

<sup>196</sup>*Wagner v. Cleveland*, 574 N.E.2d 533 (Ohio Ct. App. 1988); see also *Turner v. Cleveland School District*, 651 N.E.2d 511 (Ohio Ct. App. 1995).

Stated differently, the effect of the Ohio step-parent provision that the courts below cited as determinative of this case – that is, the termination of Marcia's parental rights if Trish adopts Jane—is rendered wholly inapplicable if Marcia *voluntarily* terminates her rights. This presents an entirely different scenario where Jane, for one brief moment, has no legal parents. Thus, the re-adoption by Marcia and Trish would not trigger the step-parent provision.<sup>197</sup>

#### V. CONCLUSION

Ohio adoption statutes do not expressly apply to cases like *In re Jane Doe*, and the rules of legislative intent, statutory application and construction provide significant leeway for courts to determine whether such adoptions should be allowed and the effects of such adoptions. The arguments articulated above demonstrate that the courts adjudicating *In re Jane Doe* could have, consistent with sound legal analysis, and should have, consistent with the best interest of Jane and similarly situated children, found the adoption of Jane by Trish allowable under Ohio law without the termination of the biological mother's rights. So why the opposite result?

The possibility of insidious bias against gay parents cannot be overlooked. Judge Wise's concurrence reflects fear of starting down that slippery slope –if this type of adoption is permitted, gay marriages cannot be far behind. But such fears are unfounded. Allowing Trish to adopt Jane does not change her legal status vis-à-vis Marcia. The adoption would provide standing for Marcia to seek judicial intervention if Trish fails to honor her legal obligations to Jane. But such intervention would be on Jane's behalf and for Jane's benefit, not Marcia's.

Courts resolving custody and visitation cases have almost uniformly rejected sexual orientation as a reason to deny a parent's access to a child. This trend is due, in no small part, to the ever-growing and virtually uncontested empirical data demonstrating that gay and lesbian parents are just as qualified as their heterosexual counterparts to raise healthy and well-adjusted children. Courts have also recognized the value of having a legal as well as emotional and psychological bond to more than one parent. A number of states have interpreted and applied their adoption laws to accommodate these realities.<sup>198</sup> A few states, including Ohio, have refused to do so.<sup>199</sup> But any state truly motivated to serve the best interests of their

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<sup>197</sup>The point offered here is simply that the courts should have considered this independent argument made by the parents. However, pursuing this avenue is not without risks. For example, when Marcia's rights as biological mother are terminated, Jane has, in the eyes of the law, no legal parents. This technically renders her a ward of the state, and arguably triggers additional considerations under Ohio's adoption statutes, such as the requirement of obtaining a home study and consent to the proposed adoption by the agency charged with Jane's care. These requirements might all be satisfied before Marcia's rights are terminated, but this would require significant coordination between Marcia, Trish, the probate court, and any other official entity that gains standing in the matter when Jane is "parentless."

<sup>198</sup>See *M.M.D. & B.H.M.*, 662 A.2d 837, 859 (D.C. 1995); *In re Petition of K.M. and D.M. to Adopt Olivia M.*, 653 N.E.2d 888, 899 (Ill. 1995); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535, 541 (N.J. 1995); *Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993); *In re Jacob*, 600 N.E.2d 397, 405-06 (N.Y. 1995); *Adoptions of B.L.V.D. & E.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993).

children will reject archaic models of family life and allow second parent adoptions, as long as it is in the best interest of the children involved to do so.

A New Jersey court expressed the rationale for granting second-parent adoptions quite eloquently:

This case arises at a time of great change and a time of recognition that, while the families of the past may have seemed simple formations repeated with uniformity, the so called 'traditional families' have always been complex, multifaceted, and idealized. . . . We cannot continue to pretend that there is one formula or correct pattern that should constitute a family in order to achieve the supportive, loving environment we believe children should inhabit. This court finds that the family before it is providing a secure, stable, and nurturing environment for the child. . . . [The adopting parent] is one of the two cornerstones of this supportive home, and beyond all other issues it is upon this factor that this court primarily rules in granting this petition for adoption.<sup>200</sup>

This could – and should - have been the concluding paragraph in *In re Jane Doe*.

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<sup>199</sup>See *In re Adoption of Baby Z*, 724 A.2d 1035 (Conn. 1998); *Georgia G. v. Terry M.*, 516 N.W. 2d 678, 684 (Wisc. 1994).

<sup>200</sup>*Adoption of a Child by J.M.G.*, 632 A.2d 550, 554-55 (N.J. Super. Ct. Ch. Div. 1993).